

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

**In the Matter of
DIGHTON ZONING BOARD OF APPEALS
and
STONE RIDGE ESTATES, LLC**

No. 2010-01

**DECISION ON INTERLOCUTORY APPEAL
REGARDING APPLICABILITY OF SAFE HARBOR**

June 21, 2010

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**DECISION ON INTERLOCUTORY APPEAL
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I. INTRODUCTION

This case is an interlocutory appeal brought by the Dighton Zoning Board of Appeals (Board) pursuant to 760 CMR 56.03(8)(c). The Board has appealed the Department of Housing and Community Development's (DHCD) determination dated December 21, 2009, that the Board had not established a safe harbor under 760 CMR 56.03(1) with respect to the application for a comprehensive permit by Stoney Ridge Estates, LLC (Stoney Ridge).

Under 760 CMR 56.03(8)(a), a board seeking to rely on one of several enumerated safe harbors precluding appeals by developers of adverse decisions under G.L. c. 40B must notify the developer within 15 days of the opening of the Board's hearing on the developer's comprehensive permit application. If the developer wishes to challenge the board's assertion of one of these statutory and regulatory protections, it must provide written notice to DHCD within 15 days.¹ DHCD "shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials." *Id.* Either party may file an

1. Under the former comprehensive permit regulations, municipal zoning boards raised the applicability of a safe harbor as an affirmative defense during the appeal to the Committee in the ordinary course. See 760 CMR 31.06(5); 31.07(1). Also see *West Wrentham Village, LLC v. Wrentham*, No. 05-04, slip op. at 2 (Mass. Housing Appeals Committee July 13, 2005 Ruling on Motion to Dismiss), *aff'd* 451 Mass. 511 (2008).

interlocutory appeal of an adverse decision by DHCD to the Housing Appeals Committee, but must do so within 20 days of receipt of DHCD's decision. The interlocutory appeal to DHCD is conducted on an expedited basis, as the proceeding before the board is stayed pending the Committee's determination. 760 CMR 56.03(8)(c). The Committee's hearing on the issue, like all of its proceedings, is *de novo*. G.L. c. 40B, § 22. See *In the Matter of Bourne Zoning Board of Appeals and Chase Developers, Inc.*, No. 08-11 (Mass Housing Appeals Committee June 8, 2009). Section 56.03(8)(a) provides that the Board has "the burden of proving satisfaction of the grounds for asserting [the safe harbor]."

II. PROCEDURAL BACKGROUND

On or about October 7, 2009, Stoney Ridge filed an application with the Board for a comprehensive permit. Stoney Ridge Exh. 1 (also Board Exh. 6). The Board opened the public hearing on the Stoney Ridge application on November 10, 2009. By letter dated November 12, 2009, the Board timely provided Stoney Ridge a notice of safe harbor rights pursuant to 760 CMR 56.03(8)(a), informing the developer that the Town of Dighton had met the grounds required to have a certified Housing Production Plan (HPP) defined in 760 CMR 56.03(4)(f), and therefore it considered a denial of the application for a comprehensive permit or the imposition of conditions on any approval to be consistent with local needs under G. L. c. 40B. Board Exh. 5. By letter dated November 24, 2009, Stoney Ridge notified the Board and DHCD that it challenged the Board's assertion of safe harbor rights, claiming that Dighton had not produced the necessary affordable units for entitlement to the certification of municipal compliance with the Town's HPP. Stoney Ridge Exh. 1. In a letter dated December 21, 2009, DHCD notified the Town that "the Board has not met its burden of proof for asserting that a denial or approval with conditions would be consistent with local needs on the grounds that it has [met] one of the 'safe harbor' standards set out at 760 CMR 56.03(1)." Board Exh. 7. The Board has appealed that determination to the Committee.

The parties waived a conference of counsel and evidentiary hearing, allowing a decision on the written record.² The presiding officer granted the parties the opportunity to submit any documents they wished to have included in the record for consideration. The Board submitted

2. Stoney Ridge's consultant notified the Committee that the developer believed the matter was between the Town and DHCD.

several exhibits and requested that the presiding officer take official notice of certain DHCD documents. Through its consultant, Stoney Ridge submitted into the record a copy of the November 24, 2009 letter from Delphic to the Board. The presiding officer took official notice of the following documents pursuant to 760 CMR 56.06(8)(b):

- 1) DHCD Comprehensive Permit Guidelines, dated July 30, 2008;
- 2) DHCD Housing Production Plan Guidelines, dated February 22, 2008; and
- 3) DHCD Housing Production Plan Frequently Asked Questions, revised December 2008.

Only the Board submitted written argument.

III. FACTS

On July 7, 2004, the Board approved a comprehensive permit for Dighton Woods, LLC, which included the approval of the construction of 15 affordable units. Board Exh. 4; Board Supplemental Exh. 1. Pursuant to that approval, those affordable units were added to the Subsidized Housing Inventory (SHI) for Dighton in 2004. Board Exh. 3.

By letter dated November 21, 2008, Dighton Woods requested a change to its 2004 comprehensive permit to increase the number of lots in the project. Board Supp. Exh. 2. The Board determined that the modification request was a substantial change because it involved an increase of more than 10% of the total units for the development and conducted a public hearing on the request. Board Exh. 4; Board Supp. Exh. 1. See 760 CMR 56.05(11); 56.07(4). In a decision filed March 9, 2009, the Board approved the addition of 13 lots, or units, three of which would be affordable. Board Supp. Exh. 1. Pursuant to that approval, the Town filed a request for the addition of the three new affordable units to the SHI for Dighton in 2009. Board Exh. 2.

In a decision filed April 13, 2009, the Board approved a comprehensive permit for Puddingstone Circle Estates (Puddingstone) for 37 units, including 10 affordable units. Pursuant to that approval, the Town filed a request for the addition of the 10 affordable units to the SHI for Dighton in 2009. Board Exh. 2.

By letter dated May 27, 2009, DHCD approved the Town of Dighton's Housing Production Plan (HPP) pursuant to 760 CMR 56.03(4). DHCD's letter stated that the HPP was effective on April 22, 2009 with a five-year term to expire on April 21, 2014. In its letter

DHCD advised the Town that 0.5% of the year-round housing units equaled 11 units. Board Exh. 1.

By letter dated September 9, 2009, the Town requested that DHCD issue a certification of municipal compliance with the HPP. It based its request on the Board's approval of 10 affordable units as part of a comprehensive permit issued to Puddingstone and three affordable units as part of a modification to a comprehensive permit issued to Dighton Woods. Board Exh. 2. In a letter dated October 7, 2009, DHCD denied the Town's request for certification of compliance of its HPP, stating:

The Town of Dighton's certification request included Puddington [sic] Circle Estates (SHI ID #9183 units) and Dighton Woods (SHI ID #4769). These developments are currently eligible for inclusion on the SHI. The Dighton Woods development was initially permitted in 2004 and is not eligible for certification. Puddington [sic] Circle Estate was initially permitted in 2009 and is eligible for certification, but falls short of the minimum number of units for a one year certification.

Board Exh. 3.

By letter dated November 4, 2009, the Town submitted to DHCD a request for reconsideration of the refusal to certify the Dighton HPP. In that request it states:

DW's initial comprehensive permit was filed with the Town Clerk on July 7, 2004 for the construction of fifty-two (52) units, including thirteen (13) affordable units. On November 21, 2008, DW filed an application with the Zoning Board of Appeals to amend its comprehensive permit to construct additional units. The application to amend was deemed a substantial change by the Zoning Board of Appeals [due to it involving an increase of more than 10% of the total units for the development per 760 CMR 56.05(11) and 760 CMR 56.07(4)]. The Zoning Board of Appeals held a public hearing on the requested amendment and voted to approve the construction of thirteen (13) additional units, including three (3) affordable units. This decision was filed with the Town Clerk on March 9, 2009.

Board Exh. 4. The record does not indicate an explicit decision by DHCD on the reconsideration request. However, DHCD's December 21, 2009 determination that Dighton was not eligible to claim the safe harbor reiterated that the Dighton Woods units were not eligible to be counted for certification. Board Exh. 7. In that determination, DHCD also relied upon a "Frequently Asked Question (FAQ)" document posted on the DHCD website, which states: "[u]nits count for certification as soon as they are **initially** eligible to be counted on the SHI" (Emphasis in original.) Housing Production Plans Frequently Asked Questions (FAQs), rev. Dec. 2008, p. 4.

IV. DISCUSSION

The dispute arises solely regarding DHCD's exclusion of the three affordable units added to the SHI in 2009 for the Dighton Woods project, which were added as a result of the approval of a modification of the original 2004 comprehensive permit for that project. DHCD denied the Town's request for certification of municipal compliance of its HPP on the ground that the 10 affordable units added in 2009 as a result of the Puddingstone Circle Estates comprehensive permit, although countable for HPP certification, were insufficient without the Dighton Woods units to meet the 0.5% annual housing production requirement. The inclusion of the three Dighton Woods units for certification would bring the Town into compliance, and would establish an irrebuttable presumption and therefore be conclusive of the ultimate issue of whether the Board's action on the comprehensive permit application is consistent with local needs. 760 CMR 56.07(3)(a); 56.03(1)(b).

The question of whether Dighton may invoke the safe harbor rests on the interpretation of the relevant provisions of 760 CMR 56.00 using principles of construction that are well established by the courts: "A regulation is to read in the same manner as a statute" and a court "will give "words of a regulation their plain and ordinary meaning." *Ingalls v. Board of Registration in Medicine*, 445 Mass. 291, 294 (2005). We must apply the regulation consistently with its "plain terms." See *Finkelstein v. Board of Registration in Optometry*, 370 Mass. 476, 478 (1976) (court will overturn agency interpretation only if it is "arbitrary, unreasonable, or inconsistent with the plain terms of the rule itself."). In addition, we should seek to interpret the regulation to give effect to all of its provisions. *Bottomley v. Division of Admin. Law Appeals*, 22 Mass App. Ct. 652, 657 (1986) ("[w]here reasonably possible, no portion of the language of a regulation should be treated as surplusage"). Cf. *Thurdin v. SEI Boston, LLC*, 452 Mass 436, 454 (2008) ("None of the words of a statute is to be regarded as superfluous"), citing *Commonwealth v. Woods Hole, Martha's Vineyard and Nantucket S.S. Auth.*, 352 Mass. 617, 617 (1967) quoting *Bolster v. Commissioner of Corporations and Taxation*, 319 Mass 81, 84-85 (1946). While these principles similarly apply in general to the DHCD guidelines and FAQs which have been officially noticed for purposes of this proceeding, since these are only guidance documents, not duly promulgated regulations, they do not have the force of law. The foregoing principles lead to the conclusion that Dighton is entitled to rely on the safe harbor, as explained below.

The thrust of DHCD's position in excluding the three Dighton Woods units is that "Modifications/amendments to a comprehensive permit do not affect the date of initial eligibility of housing units on the SHI. *DHCD only counts those units for certification when they are initially eligible to be counted on the SHI.* (Emphasis added.) Board Exh. 7, citing the FAQs ("[u]nits count for certification as soon as they are **initially** eligible to be counted on the SHI") (Emphasis in original).

The Board argues that the regulation, the DHCD Guidelines and the FAQs do not permit DHCD to "relate back" the date of SHI eligibility of the three units approved in 2009 to 2004, when the main project was originally approved, because the three units in question were never originally eligible to be counted in 2004, nor could they have been counted then. The Board points out that the regulation, guidelines and FAQs do not specifically address how newly created units resulting from a modified comprehensive permit should be treated for HPP certification purposes. The Board also argues that Dighton had no prior notice of the "relation back" principle, and that, if such a requirement is approved, it must not include substantial modifications to comprehensive permits or modifications made more than one year after a comprehensive permit is issued.

We agree with the Board that 760 CMR 56.00 and the guidance documents do not explicitly address modifications to existing comprehensive permits which result in the addition of affordable units. Section 56.03(2)(b) states that "Units shall be eligible to be counted on the SHI at the earliest of the following:

1. For units that require a Comprehensive Permit under M.G.L. c. 40B, §§ 20 through 23, or a zoning approval under M.G.L. c. 40A or completion of plan review under M.G.L. c. 40R, the date when
 - a. the permit or approval is filed with the municipal clerk, notwithstanding any appeal by a party other than the Board, but subject to the time limit for counting such units set forth at 760 CMR 56.03(2)(c), or
 - b. on the date when the last appeal by the Board is fully resolved.
2. When the building permit for the unit is issued.
3. When the occupancy permit for the unit is issued.
4. When the unit is occupied by an Income Eligible Household and all the conditions of 760 CMR 56.03(2)(b) have been met (if no Comprehensive Permit, zoning approval, building permit or occupancy permit is required).

Also see DHCD's Comprehensive Permit Guidelines § II.A.2. (July 30, 2008); FAQs revised Dec. 2008. The FAQs add the clarification that units count for certification "as soon as they are **initially** eligible to be counted on the SHI...." (Emphasis in original.) FAQs, p. 4.

A careful examination of the relevant provisions and the facts shows that the reasons for excluding the three Dighton Woods units are not supported by the regulatory language or the guidance documents. Although there are no direct references to modifications, the regulation explicitly refers to when "units" become eligible to be counted – it does not state when an entire project is eligible to be counted. Such a distinction precludes reliance on the earlier eligibility of the Dighton Woods project in 2004 to exclude the units newly approved in 2009. Indeed, the use of the word "units" indicates that individual units are to be considered, separate from, and instead of, entire developments.

Since the three new Dighton Woods units were initially added to the SHI in 2009, not 2004, they could not have been eligible to be counted on the SHI before 2009. Therefore, based on the plain language of § 56.03(2)(b), they should be counted toward the 0.5% requirement for 2009. Excluding these units from counting in 2009 would eliminate their inclusion in any year's count, which is inconsistent with the regulatory language. Including the units in 2009 is also consistent with the purpose and goals of the comprehensive permit regulation and Chapter 40B to encourage towns to increase their stock of low and moderate income housing. Because we rule that the language of the regulation, as well as its intent, permits the counting of these three units for certification in 2009, we do not need to reach the Board's arguments regarding the nature of a "relation back" concept or any exceptions thereto.

The three new Dighton Woods units were permitted to be counted on the SHI as of the date the Dighton Woods modified comprehensive permit was filed with the Dighton town clerk. 760 CMR 56.03(1); 56.03(2)(b). The Dighton Woods project modification, together with the Puddingstone project, provided for a sufficient number of affordable units to meet the housing production numerical target for the calendar year in question, and warranted certification by DHCD. 760 CMR 56.03(4)(f). This result, which is based on the language of the regulation and its plain meaning, is also consistent with a purpose of Chapter 40B to encourage towns to take positive measures toward the development of affordable housing. Therefore the Board has met its "burden of proving satisfaction of the grounds for asserting [the safe harbor]." 760 CMR 56.03(8).

Finally, in challenging the Board's assertion of a safe harbor, Stoney Ridge relies on DHCD's denial of certification and argues that Dighton needed 12, rather than 11, affordable units, to meet the 0.5% annual housing production requirement based on the number of year-round housing units in Dighton in 2000. 760 CMR 56.03(4)(f). This difference is immaterial here, since the disputed three units would bring the total of eligible units to 13. Stoney Ridge also asserts that only eight building permits have been issued to Dighton Woods between August 1, 2007 and August 12, 2009, and an adjustment to the SHI may be in order in accordance with 760 CMR 56.03(2)(c). Stoney Ridge Exh. 1. However, it has not shown that such earlier permits are relevant. Its final assertion, that one of the conditions in the modified permit would preclude MassHousing giving final approval on the modification, is not substantiated on the record. In any event, the developer's assertions are insufficiently briefed to warrant consideration.

We determine that Dighton is entitled to a certification of compliance with its housing production plan, pursuant to 760 CMR 56.03(4)(f). A certification of compliance with a town's HPP "shall be deemed effective on the date upon which the municipality achieved its numerical target for the calendar year in question, in accordance with the rules for counting units on the SHI set forth in 760 CMR 56.03(2)" and "shall be in effect for a period of one year from its effective date." 760 CMR § 56.03(4)(f).

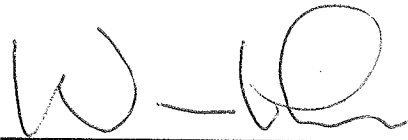
Accordingly, Dighton is entitled to rely upon an irrebuttable presumption of the existence of the safe harbor for the purposes of Stoney Ridge's application for a comprehensive permit filed on or about October 7, 2009. Stoney Ridge may proceed with its application subject to this determination, or it may reapply for approval of its comprehensive permit application after the expiration of this safe harbor without the constraint of the safe harbor for those particular units.

V. CONCLUSION AND ORDER

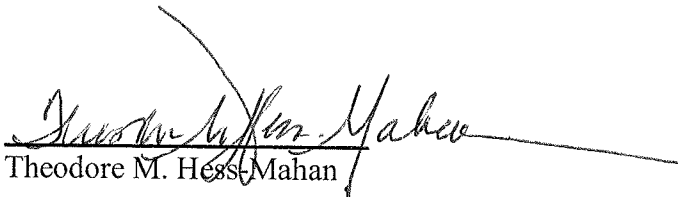
For the reasons set forth above, the decision of DHCD denying the safe harbor to the Town of Dighton is hereby overturned. In accordance with 760 CMR 56.03(8), this matter is remanded to the Board for further proceedings consistent with this decision and in accordance with 760 CMR 56.05.

Housing Appeals Committee

Dated: June 21, 2010



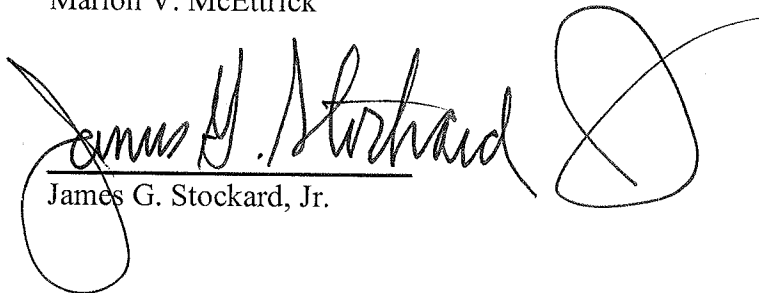
Werner Lohe, Chairman



Theodore M. Hess-Mahan



Marion V. McEttrick



James G. Stockard, Jr.



Shelagh A. Ellman-Pearl, Presiding Officer